Date: July 22, 1997

Case No.: 96-INA-18

In the Matter of:

REV. RAMESH PRASHAD,
Employer

On Behalf Of:

BETTY GANPAT,
Alien

Appearance: Peter J. Lorene, Esq.
For the Employer/Alien

Before: Holmes, Huddleston, and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On May 13, 1994, Rev. Ramesh Prashad ("Employer") filed an application for labor certification to enable Betty Ganpat ("Alien") to fill the position of Domestic Cook (AF 5-6).[2] The job duties for the position are:

> Plan/cook/serve meals in private home for Hindu Pundit. Prepare all ingredients and cook vegetables, sweet meats and bake breads, pastries and cakes in accordance with Hindu religious restrictions. Clean kitchen and all cooking equipment.
>
> The only requirement for the position is two years of experience in the job offered.

The CO issued a Notice of Findings on May 10, 1995 (AF 20-22), proposing to deny certification on the grounds that it does not appear feasible that the listed duties constitute full-time employment in the context of the Employer's household, in violation of § 656.50 (recodified as § 656.3). The CO advised the Employer to provide evidence that clearly establishes that the position, as performed in his household, constitutes full-time employment and was not created solely to qualify the Alien for a visa as a skilled worker.

Accordingly, the Employer was notified that it had until June 14, 1995, to rebut the findings or to cure the defects noted.

In his rebuttal, dated June 12, 1995 (AF 23-36), the Employer first contended that a Notice of Findings must state with specificity the evidence upon which it is based in order to be deemed adequate; no explanation has been provided in this NOF as to why his letter of July 18, 1994, is insufficient regarding full-time employment. The Employer concludes that the NOF is inadequate. The Employer then went on to respond to the issue raised in the NOF.

The Employer contended that the offered position does constitute full-time work within the meaning of § 656.3 and within the particular circumstances of his household, which consists of himself, his wife, and their four children, ages 19, 17, 11, and 6. He included with his rebuttal a

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

[2] On July 18, 1994, the Employer amended the application to reflect a weekly salary of $490 and to correct ETA 750A, Item 17, which originally showed that the Alien would supervise two employees but was a typographical error as there are no supervisory duties.

daily/weekly schedule of duties, which listed 18 meals per day/90 per week, for the Employer's family. The housekeeping and child care will be provided by family members. The Employer stated that he has never employed a full-time cook in the past but that due to he and his wife's increasing professional and business responsibilities, they are no longer able to attend to the cooking duties. He also provided a work schedule for he and his wife and a school schedule for their children.

The Employer attached a copy of his July 18, 1994, letter to his rebuttal. In this letter he lists the schedules for himself, his wife, and their four children. He stated:

> By far, the one task for a family of six which requires full time assistance is that of cooking. The planning and preparation work, as well as the actual cooking and cleaning up afterward for a family of six individuals easily requires eight hours per day.

The CO issued the Final Determination on June 21, 1995 (AF 37-39), denying certification because it appears that the offered position does not constitute full-time employment, but was created solely for the purpose of qualifying the Alien for a visa as a skilled worker. Accordingly, the Employer remains in violation of § 656.3.

On July 24, 1995, the Employer requested review of the Denial of Labor Certification (AF 40-53). On October 3, 1995, the CO forwarded the record to this Board of Alien Labor Certification Appeals ("BALCA" or "Board"). On November 14, 1995, the Employer submitted a brief, titled Appeal.

Discussion

The factual findings of the Certifying Officer generally are affirmed if they are supported by relevant evidence in the record as a whole which a reasonable mind might accept as adequate to support a conclusion. In the instant case, the CO made a factual finding that the Employer had not established that the job opportunity constitutes permanent, full-time employment. Thus, it must be determined whether that conclusion is a reasonable inference from this record.

In the NOF, the CO asked that the Employer supply specific information regarding the job opportunity (AF 20-21). Specifically, the CO requested that the Employer provide evidence regarding the following: (1) the number of meals prepared daily and weekly and the length of time required to prepare the meals and the number of people for which the meals are prepared; (2) the frequency of household entertaining in the 12 calendar month period immediately preceding the filing of the application, including the dates of entertainment and the number of guests entertained and the number of meals served; (3) the duties, other than cooking, that the Alien will be required to perform; (4) the daily and weekly work schedule of the parents, the school schedules of the children, and how the children are cared for during the Alien's scheduled time off; and, (5) who will perform the general household maintenance duties such as cleaning, clothes washing, vacuuming, etc.

In his rebuttal, the Employer stated that the cook will be required to cook 18 meals per day and 90 meals per week (AF 34). He noted that the evening meal will take approximately three hours to prepare. After completing the evening meal, the Employer stated that the Cook will be required to mix the ingredients to make fresh breads, pastries, or cakes which, he stated, will take one to two hours. Finally, the Employer stated that the Cook will then serve dinner and clean up the kitchen, which will take approximately one hour. He further stated that each meal will be prepared for himself, his wife, and their four children (AF 33). The Employer explained that the cook will not be required to perform any non-cooking related duties as these are performed by family members. Finally, the Employer noted that his two eldest children care for the two younger children during the parents' absence. He stated that the two younger children attend school from 8:30 a.m. until 3:00 p.m. (AF 31).

In the Final Determination, the CO found that the Employer failed to establish that the job opportunity constitutes permanent, full-time employment. We find that the CO's determination in this case is supported by substantial evidence.

Section 656.3 provides that "employment" means permanent, full-time work by an employee for an employer other than oneself. The employer bears the burden of proving that a position is permanent and full time. If the employer's own evidence does not show that a position is permanent and full time, certification may be denied. *Gerata Systems America, Inc.*, 8-INA-344 (Dec. 16, 1988). Further, if a CO reasonably requests specific information to aid in the determination of whether a position is permanent and full time, the employer must provide it. *Collectors International, Ltd.*, 89-INA-133 (Dec. 14, 1989). As outlined above, the CO, in the NOF specifically asked the Employer to state the length of time required to prepare each meal (AF 21). Based upon the vague daily schedule provided by the Employer, it appears that the job opportunity only requires five to six hours per day (AF 34). In *Leonard Green*, 94-INA-213, a Panel of the Board noted that 30 hours per week is not full-time employment. Therefore, we find that the Employer's own evidence does not show that the job offered is full-time employment. As such, we find that the CO has made a reasonable inference based upon the relevant evidence contained in the record. Accordingly, the CO's denial of labor certification is hereby AFFIRMED.[3]

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

[3] We note that this job opportunity contains a requirement for two years of specialized cooking experience which could be considered to be unduly restrictive. The job requirements include two years of experience in the job duties of Hindu cooking. The practical effect of this requirement is to eliminate any U.S. applicant with two years of cooking experience, but no experience in Hindu cooking. However, in view of our decision that the CO's decision is supported by substantial evidence, it is not necessary to address the issue further.

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.